New Brunswick Human Rights Commission
Guideline on Drug and Alcohol Testing in the Workplace
Updated May 6, 2011

Please Note

The New Brunswick Human Rights Commission ("Commission") develops guidelines as part of its mandate to prevent discrimination. These guidelines are intended to help individuals understand their legal rights and responsibilities under the New Brunswick *Human Rights Act* ("*Code*").

This guideline gives the Commission's interpretation of the provisions contained in section 3 of the *Code* relating to drug and alcohol testing in the workplace.[1] It is subject to decisions by boards of inquiry, tribunals and courts. Read this guideline in conjunction with those decisions and with the specific language of the *Code*. If there is any conflict between these guidelines and the *Code*, the *Code* prevails. This guideline is not a substitute for legal advice. Direct any questions regarding this guideline to the Commission's staff.

1. Introduction to Drug and Alcohol Testing in the Workplace

Drug and/or alcohol dependency is a recognized disability under the *Code*. As a result, discrimination in employment based on an individual's dependency on drugs or alcohol is prohibited.

It is the Commission's position that drug and alcohol testing in the workplace is *prima facie* ("at first glance") discriminatory. This means that the testing is discriminatory unless the employer can show that the testing was reasonably necessary.

Drug Testing
Drug testing does not measure impairment at the time of the test. As a result, drug testing does not reliably indicate whether an employee will be impaired while working. To make an employee or potential employee undergo drug testing as a condition of employment may be considered discriminatory based on a disability or a perceived disability.

Alcohol Testing
Alcohol testing can measure the level of impairment at the time the test is given; therefore, it is possible to determine an employee's level of impairment at work. Nonetheless, alcohol testing may still be considered discriminatory based on a disability or a perceived disability.

Casual vs. Dependent Users
The *Code* only protects individuals who are **dependant** on drugs or alcohol. It does not cover those who are casual or recreational users of drugs or alcohol. An employee must show that they are dependent on drugs or alcohol by submitting an assessment done by a health care provider to their employer. [2]

Perceived Dependency
An individual who is perceived as being drug or alcohol dependent and who is discriminated against on this basis in employment can also file a complaint with the Commission. As a result, if an employee is tested for drug and/or alcohol use and their test results are negative, that employee may still have grounds to file a complaint with the Commission based on a perceived disability.

2. Safety Sensitive Positions

A safety sensitive position is one in which an employee's drug or alcohol impairment could lead to direct and significant risk of injury to the employee, others, or the environment.[3]

It may be acceptable to require an employee or an applicant to undergo drug and/or alcohol testing if the individual is in, or is applying for, a safety sensitive position. If the test result is positive and the employee provides a medical note which indicates that they have a dependency, then the employer must accommodate the employee, up to the point of undue hardship.

A safety sensitive position is determined by examining:

- the context of the industry;
- the particular workplace ;
- the employee's direct involvement in high-risk operations;
- the role of trained supervisors;
- the existence of checks and balances in the workplace.

3. Different Reasons for Testing

Employers conduct drug and/or alcohol tests on employees and potential employees for different reasons. The main reasons are:

- Pre-employment testing;
- Random testing;
- Testing for reasonable cause; and
- Testing following disclosure.

PRE-EMPLOYMENT TESTING:

Some employers still conduct pre-employment testing. In order for pre-employment drug and alcohol testing to be permitted under the *Code,* the employer must demonstrate that the test is a *bona fide* ("in good faith") occupational qualification. This requires the employer to show that the test accurately assesses the candidate's ability to do the duties and responsibilities of the job.

It is important to note that a positive test **does not** indicate that the potential employee will be impaired while on the job. Therefore, such testing may be criticized as being unreasonable and unnecessary to accomplish the legitimate goal of hiring workers who will not be impaired at work.

Pre-employment drug and alcohol testing **is** permitted in very limited cases. For example, pre-employment testing may be permitted where a pre-employment exam provides a doctor with reasonable cause to suspect that the applicant is dependant on drugs or alcohol. It has also been found that commercial bus drivers and truck drivers may be subject to pre-employment testing.[4]

If a pre-employment drug and/or alcohol test result is positive, then an employer may not withdraw an offer of employment. The employer will have a duty to accommodate, up to the point of undue hardship, any applicants who are dependent on drugs or alcohol.

RANDOM TESTING:

Random drug testing is not determinative of present impairment. Drugs can stay in a person's system for days or weeks therefore a random test cannot be shown as reasonably necessary to accomplish the goal of ensuring no drug impairment while on the job. There is one exception to this: It has been determined that it may be reasonable to subject truck drivers and commercial bus drivers to random drug tests[5].

Testing for alcohol is a different matter since such tests can determine the level of present impairment. If an employer advises that random alcohol testing is a condition of employment for people in **safety sensitive positions**, then said employees may be tested for alcohol consumption. However, if a test is positive and an employee is deemed to be dependant, then an employer has a duty to accommodate that employee, up to the point of undue hardship.

People who are **not** in a safety sensitive position should not be randomly tested.

TESTING FOR REASONABLE CAUSE:

An employer may have reasonable cause to order drug or alcohol testing for people in safety sensitive positions in certain circumstances.

- *Post-accident/ incident*

An employer may be allowed to test an employee following an accident, a near miss or dangerous behavior. The employer has an interest to assess and determine whether an employee consumed a substance that may have contributed to the workplace accident or incident. If such a test is warranted, then it must be done as soon as reasonably practical. It should be noted that such tests are not permitted if there is evidence to show that an employee did not cause the accident or incident (for example: structural or mechanical failure).

- *Unfit condition*

An employer may be allowed to test an employee in a safety sensitive position if he or she presents themselves to work in an unfit condition and there is reasonable cause for believing that it involves substance abuse.

It should be noted that there is no clear guidance from the courts with respect to non-safety sensitive positions. Therefore employers should be very cautious in how they proceed in such circumstances.

TESTING FOLLOWING DISCLOSURE:

In an attempt to determine fitness to perform work in a safety sensitive position, employers may ask employees to provide information through a pre-employment questionnaire or as part of a medical examination.

It has been found that employers can require employees in safety sensitive jobs to disclose current use or a history of use (5 to 6 years for alcohol and 6 years for drugs). The courts deemed these periods of time to be appropriate because the risk of relapse is no greater than the risk of a person in the public-at-large to suffer from a substance abuse problem.[6]

An employee in a non safety sensitive position does not need to disclose past abuse or dependency unless the employer can show it is reasonably necessary to accomplish the legitimate goal of the position.

Testing following disclosure may be acceptable for employees in safety sensitive positions.

4. Duty to Accommodate

The *Code* requires employers to avoid policies that have a discriminatory effect on employees who have a physical or mental disability. As a result, an employer has a duty to accommodate their employees' drug and/or alcohol dependency to the furthest point possible short of undue hardship.

What is undue hardship?

- Undue hardship occurs if accommodating an employee's drug and/or alcohol dependency would be extremely difficult for an employer.
- The determination of undue hardship depends entirely on the circumstances.
- Relevant factors include:
    - Health and safety concerns;
    - Past efforts to accommodate;
    - Response to prior treatments or corrective programs and the employee's prognosis;
    - Nature and seriousness of the employee's violation;
    - Cost of the accommodation;
    - Size of the workplace/workforce;
    - Economic conditions facing the employer;
    - Availability of non safety sensitive positions in the workplace.

As such, it is recommended that the employee be referred to a substance abuse professional to determine if dependency is an issue. If so, then the employer should support the employee and permit them to go to treatments or rehabilitation. The employer may be justified in removing the employee from the safety sensitive job if there is a recent history of abuse or the person is an active user.

Once the employee or applicant completes the program, the individual should be returned to their position. The employer may require the employee or applicant to undergo follow-up testing as a condition of employment (only in safety sensitive positions). If there is continued use, then employer action, including dismissal, **may** be justified. However, the employer must be aware that the chance of relapse is high and significant in these cases. As such, an employer should continue to accommodate those who relapse up to the point of undue hardship.

Undue hardship may be shown when an employee continues to relapse despite continued participation in an employer supported rehabilitation program or when several relapses occur in a short period of time. This determination is fact dependent.

In circumstances where substance abuse professionals have determined that the employee's drug or alcohol use is casual, then the employee or applicant may be returned to their position and the employer may take appropriate disciplinary measures.

Examples of Accommodations:

- Assignment to a non safety sensitive position while the employee or applicant undergoes treatment or rehabilitation;
- Time off to permit the employee to seek treatment or rehabilitation;
- Accommodation of an employee's relapses to the point of undue hardship.

Points to remember:

- Automatic dismissal for past or present dependency is a violation of the Code.
- Denial is a symptom of addiction and failure to disclose is not necessarily grounds for dismissal.
- A person seeking help for his or her addictions should not be disciplined.

5. Limits to Accommodation

As previously stated, drug and/or alcohol testing is *prima facie* ("at first glance") discriminatory.

Conduct may be found to be non-discriminatory if the employer can show that the drug and/or alcohol testing is based upon a *bona fide* ("in good faith") occupational qualification (BFOQ) as determined by the Commission.[7]

In order to be a BFOQ, the drug and/or alcohol testing policy adopted by the organization must pass the "Meiorin Test".[8] This three part test requires that the testing be:

1. Adopted for a purpose or goal that is rationally connected to the function being performed;
2. Adopted in good faith and in the belief that it was necessary to fulfill that purpose or goal;
3. In fact, reasonably necessary to accomplish that purpose or goal, in the sense that the employer, owner or service provider cannot accommodate affected individuals without incurring undue hardship.[9]

In order to show that a BFOQ exists for employees in safety sensitive positions, several factors will be considered, including:

- Is the employee under direct supervision?

- Are there less invasive alternatives to drug and/or alcohol testing that can help determine whether employees in safety sensitive positions are impaired on the job?
- Is there a high occurrence of drug use in the industry of the workplace?
- Does the employer offer an employer supported rehabilitation program?
- Is the employer required to comply with legislation or regulations (for example: occupational health and safety or transportation regulations)?

In some circumstances, the nature or degree of a person's dependency on alcohol and/or drugs may prevent that individual from performing the essential duties of a job. Section 3(7)(a) of the *Code* provides that a termination of employment or a refusal to employ a person because of a BFOQ, based on the nature of work in relation to the physical and/or mental disability, is allowable.

The duty to accommodate is a multi-party responsibility and in order to be successful, all parties are required to participate fully.

If an employee clearly has symptoms of dependency but continuously denies having a substance abuse problem and refuses to be examined by a health professional and seek treatment, then the employer's duty to accommodate may not be engaged.

Please see the New Brunswick Human Rights Commission Guideline entitled *Guideline for BFOQ's and BFQ's and the Duty to Accommodate* for more information.

6. Last Chance Agreements

Last chance agreements are agreements between an employer and employee, where the dependent employee or applicant waives (gives up) their right to file a human rights complaint and agrees that the employment relationship will be terminated if the employee relapses.

The Human Rights Commission should be made aware of the existence of a last chance agreement. This document will be considered, but it may not always be enforced. Despite the existence of a last chance agreement, the employer still had a duty to accommodate dependent employees or applicants up to the point of undue hardship.[10]

7. For More Information

For further information about the *Code* or this policy, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at www.gnb.ca/hrc-cdp or e-mail us at hrc.cdp@gnb.ca.

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[1] The Commission would like to acknowledge the "Policy on Alcohol and Drug Testing" prepared by the Canadian Human Rights Commission and thanks them for the use of their guideline.

[2] See *Milazzo* v. *Autocar Connaisseur* (2003), 47 C.H.R.R. D/468 and *Alberta (Human Rights and Citizenship Commission)* v. *Kellogg Brown & Root* (2007), ABCA 426.

[3] See *Entrop v. Imperial Oil*, [2000] 50 O.R. (3d) 18 C.A.

[4] See *Milazzo* v. *Autocar Connaisseur*, *supra* note 2.

[5] *Ibid.*

[6] See *Entrop* v. *Imperial Oil*, *supra*, note 1.

[7] *Human Rights Act*, R.S.N.B. 1973, s. 3(5).

[8] *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3.

[9] New Brunswick Human Rights Commission Annual Report 2002-2003, pp.13-14.

[10] *Merrick v. Ipso Saskatchewan Inc. (No. 3)* (2008), 65 C.H.R.R. D/220 (S.H.R.T.). In this case, an employee with a drug dependency disclosed this information to his employer in order to receive treatment for his addiction. Upon the employee's return to work, the employer required that the employee sign a "Conditional Reinstatement Agreement" (CRA) which required the employee to abstain from the use of narcotics, and if he violated this condition he would be immediately terminated for cause. About six months after his return to work, the employee suffered a relapse. The employee did not disclose this relapse to his employer for fear that he would be terminated. Three days after his relapse, the employee was subjected to a random drug test at his workplace. The employee tested positive and was put on indefinite suspension. A few months later his job position was terminated due to his violation of the conditions of the CRA. The Tribunal found that the employee's relapse, his failure to disclose his relapse, and his subsequent positive drug test were all causally connected to his disability. The Tribunal further ruled that "last chance agreements" such as the CRA in this case, were not outside of the scope of review by Human Rights legislation. In this case, the conditions of the employer's "last chance agreement" treated dependent employees more harshly than employees who were casual or recreational users of drugs or alcohol. As a

result, the Tribunal found that the employee in this case had been discriminated against based on his disability.